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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

WILLIAM A. BERRY,
Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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April, 1955.

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In the

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

WILLIAM A. BERRY,
Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, William A. Berry, respectfully prays for a writ of certiorari to the United States Court of Claims to review the judgment of that Court entered on November 30, 1954, dismissing the petition. The opinion of the Court of Claims is reported at 126 F. Supp. 190, and a copy thereof is appended hereto.

JURISDICTION TO REVIEW

Judgment of the Court of Claims of the United States was entered on November 30, 1954. The Chief Justice of this Court on February 28, 1955, entered an order extending the time for filing hereof until April 14, 1955. Jurisdiction

of this Court is invoked under Title 28, United States Code, Secs. 1255(1), 1651(a) and 2101(c).

THE QUESTION PRESENTED

Whether under existing law on February 15, 1945, and October 5, 1945, a Naval Reserve officer temporarily promoted following his release from the Japanese prisoner of war camp was entitled to active duty pay and allowances of the higher rank to which promoted from the dates of the promotion orders, or from earlier "dates of rank" stated therein.

STATUTES INVOLVED

The basic statute governing promotion of Naval officers is the Act of March 4, 1913, c. 188, 37 Stat. 892, 34 U.S.C.A. 870, which reads:

> "All officers of the Navy who, since the 3d day of March, 1899, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions."

The Naval Reserve Act of 1938, approved June 25, 1938, 52 Stat. 1175, 1183, as amended by the Act of August 7, 1940, 54 Stat. 865, former 34 U.S.C.A. 855(k), (now repealed) read in pertinent part:

> "In time of war or national emergency, officers of the active list of the Naval Reserve or the Marine Corps Reserve employed on active duty shall be advanced in their respective rank in the same manner as is or may be prescribed for officers of the regular Navy or the Marine Corps, respectively, in such num-

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bers for each grade or rank, as may be prescribed from time to time by the Secretary of the Navy, and when so advanced, they shall take precedence among themselves and other officers of the Navy and Marine Corps, in accordance with date of such advancement or promotion: Provided that no officer of the Naval Reserve or Marine Corps Reserve shall be advanced to a higher rank until he has qualified therefor by such mental, moral, professional and physical examinations as the Secretary of the Navy shall prescribe: Provided further that hereafter all officers of the Naval Reserve and the Marine Corps Reserve who may be advanced to a higher grade or rank in time of peace or in time of war or national emergency under the provisions of the Naval Reserve Act of 1938, shall be allowed the pay and allowances of the higher grade or rank from the dates of rank as stated in their commissions, as distinguished from the dates of commission or dates of acceptance of commission and the dates of rank as stated in their commissions shall be conclusive for all purposes. * * *"

Plaintiff's temporary promotions were pursuant to the Act of July 24, 1941, 55 Stat. 603, 34 U S.C.A. 350, providing in pertinent part:

"* * * That except as otherwise specified herein the authority granted by this Act shall be exercised only in time of war or national emergency determined by the President.

* * * * * * * * *

"Sec. 5. The temporary appointments under the authority of the Act shall be in such numbers as the President may determine that the needs of the service require and in such manner and under such regulations as he may prescribe. * * *

* * * * * * * * *

"Sec. 11. The provisions of this Act, except as may be necessary to adapt the same thereto shall apply to—

(a) Personnel of the Naval Reserve (except the Fleet Reserve) and the Marine Corps Reserve (except the Fleet Marine Corps Reserve) in like manner and to the same extent and with the same relative conditions in all respects as are provided for personnel of the Regular Navy and Marine Corps. * * *"

The Act of June 30, 1942, 56 Stat. 463, 50 U.S.C.A. App. 806, 810 (now 34 U.S.C.A. 350 k) reads in pertinent part:

"Sec. 1. The provisions of existing law insofar as they relate to * * * the permanent promotion or advancement of all officers in the Navy and Marine Corps, * * * are hereby suspended * * *.

* * * * * * * * *

"Sec. 5. Personnel heretofore and hereinafter temporarily appointed pursuant to and as defined in the Act of July 24, 1941 (Public Law 188, seventy-seventh Congress), shall be entitled to the pay and allowances of the grade or rank to which so appointed from the dates on which such appointments are made by the President, and their appointments, unless expressly declined shall be regarded for all purposes as having been accepted on the date made, without formal acceptance or oath of office."

All of these statutes must be construed in light of the Missing Persons Act of March 7, 1942, as amended, 56 Stat. 143, 58 Stat. 679, 680, 50 U.S.C.A. App. 1002, which provides in pertinent part:

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"Sec. 2. Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a neutral country, captured by the enemy, beleaguered or beseiged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter."

STATEMENT

Plaintiff sued the United States in the Court of Claims to recover additional unpaid pay and allowances due him for World War II service as a Naval Reserve officer. Jurisdiction of the Court of Claims is conferred by 28 U.S.C.A. 1491.

Plaintiff was commissioned an Ensign in the U. S. Naval Reserve on September 2, 1941, and was immediately called to active duty. He became a prisoner of the Japanese upon the surrender of Corregidor by General Jonathon Wainwright on May 6, 1942, and was liberated by American forces at Manila on February 4, 1945.

After his liberation, on February 15, 1945, he was promoted to the temporary grade of Lieutenant (j.g.) "to rank from" October 1, 1942; and on October 5, 1945, he was promoted to the temporary grade of Lieutenant "to rank from" November 1, 1942. These temporary promotions were made pursuant to the Act of July 24, 1941, 55 Stat. 603, as amended. He received pay and allowances in the respective higher ranks only from the dates of the

promotion orders themselves. In this action he seeks additional pay and allowances from the earlier "dates of rank" set out in those orders.

Plaintiff was captured by the Japanese through no fault or misconduct of his own, having been surrendered to the enemy by higher authority. He remained an Ensign during the entire period of his captivity for the simple reason that the Navy Department did not know if he was alive or dead. In the meantime, his contemporaries, officers of the same rank and equal length of service, had been promoted in due course to higher ranks. The dates they were promoted corresponded roughly to the "dates of rank" set out in plaintiff's promotion orders. The purpose of back-dating the date of rank in plaintiff's promotion orders was to provide equality of precedence, a time-honored procedure in the armed services. By this action plaintiff seeks equality in pay.

In a line of cases extending over almost one hundred years, it has been held consistently that an officer promoted "to rank from" a date earlier than his promotion orders is entitled to the pay and allowances of the higher rank from the earlier "date of rank." The reason for this rule is inherent in the reason for back-dating the promotion—to avoid inequality or discrimination from an officer being unavailable (absent, beleaguered, captured and the like) at the time he otherwise would have received advancement in rank. Only in this way was an officer absent, missing or incapacitated at the time he otherwise would have been promoted relieved from the manifest injustice of losing the increased pay during the time that exigencies of the service or the fortunes of war postponed actual ac-

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partment can provide for equality of precedence and pay among its officers in time of war or national emergency is a serious federal question of potentially far-reaching effect.

In its decision, the Court of Claims decided an important federal question in a way probably not in accord with applicable decisions of this Court. The Court of Claims departed from well established doctrine (stemming from pronouncements of this Court) that when an officer's date of rank in promotion orders is back-dated for the purpose of preventing inequality arising from the officer's unavailability at the time he otherwise would have been promoted, the pay and allowances of the higher grade begin on the earlier date of rank.

In holding that the Act of June 30, 1942, 56 Stat. 463, requires that pay and allowances of the higher rank accrue only from the date of the promotion orders (rather than the earlier date of rank stated herein) the Court of Claims decided a question of substance relating to the construction and application of a federal statute, and in doing so adopted a harsh, discriminatory and unreasonably restrictive interpretation of that Act, and an interpretation directly contrary to the intent of Congress in enacting the statute. The question has not been, but should be, decided by this Court.

The Court of Claims erred in dismissing plaintiff's petition, since it consistently has been the intent of Congress throughout successive legislation on the subject (particularly in view of the Missing Persons Act of 1942) that "date of rank" stated in promotion orders of an officer

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missing or a prisoner at the time he otherwise would have been promoted in ordinary course, should govern accrual of pay and allowances of the higher rank.

ARGUMENT AND AUTHORITIES

SUMMARY

A Naval Reserve officer temporarily promoted in World War II service, following his release from over three years as a prisoner of the Japanese, "to rank from" an earlier date stated in the promotion order, is entitled to additional pay and allowances from the earlier effective date, rather than merely from the date of the promotion order. This rule has stood for over a hundred years; and it is designed to relieve an officer captured or missing in combat from the manifest injustice of losing extra pay for the period that his status as missing delayed his promotion. When an officer is absent or missing at the time he normally would be promoted, inequality is avoided by back-dating the effective date of his promotion upon his later return. Higher pay accrues as of the earlier effective date.

The Court of Claims in this case held that although such has been the policy and the rule prior to 1942, the opposite result was required as to temporary wartime promotions made under the Act of July 24, 1941, because of language in the Act of June 30, 1942. The 1942 Act was designed to preserve, not to destroy, promotion rights of officers killed in action or prisoners of war, by eliminating the necessity of a formal acceptance of promotion and oath of office. Congress never intended to create an even

more serious inequity than the one it sought to correct thereby.

The anomalous result of the Court's decision is that although adjustment of the effective date of a promotion (to avoid inequality between officers in precedence and pay) is proper as to permanent peace-time promotions, the Navy Department cannot thus correct inequities in wartime, *when those inequities are most apt to occur.* This result is neither consistent with justice, nor with the intent of Congress in enacting the legislation.

ARGUMENT

Rank and precedence among officers is a matter of importance in our armed services. Throughout pertinent legislation and administrative policy, the guiding principle has been equality of opportunity among officers of equal rank and service. The effort is unceasing to eliminate technicalities in the law or regulations which unfairly rob an officer or class of officers of the benefits of seniority and promotion. This is especially true where the fortunes of actual war have caused an officer through no fault of his own to be unavailable to meet the procedural requisites to promotion. In order to prevent discrimination against an officer on the high seas, in combat or on a mission, or captured or beleaguered by the enemy, seniority or precedence on promotion traditionally has been established independently of the date of promotion itself.

Advancement in rank has always carried with it the benefits of additional pay and allowances. The language of successive statutes governing pay and allowances has

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differed somewhat through the years. But there has been no departure from the principle, in judicial construction of the successive statutes, that where promotion orders provide an earlier date of rank for purposes of precedence, the earlier date of rank also establishes the right to higher pay and allowances. Congress has evinced no intent to alter that salutary principle in any legislation on the subject.

The back-dating of "dates of rank" to preserve equality in precedence and pay among officers of equal rank and service has been a recognized custom throughout our military history. See 3 Op. Atty. Gen. 124. The doctrine appears in express language in the Act of July 16, 1862, 12 Stat. 586, and the Act of July 15, 1870, 16 Stat. 333.[1]

This Court in *Hunt* v. *U. S.*, 116 U.S. 394, 6 Sup. Ct. 406, 29 L. Ed. 674, construed the 1862 statute to mean just what it said (116 U.S. 397):

> "* * * We think the law was properly construed by Mr. Welles, secretary of the navy, in his letter of May 12, 1864, to the fourth auditor, in which he said: 'There may be some obscurity in the wording of the

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[1] The 1870 Act read in pertinent part: "That hereafter the increased pay of a promoted officer shall commence from the date he is to take rank as stated in his commission; but if an officer of a class subject to examination before promotion shall be absent on duty and by reason of such absence or other cause not involving fault on his part, shall not be examined at the time required by law or regulation, and afterwards be examined and found qualified, the increased rate of pay to which his promotion shall entitle him shall commence from the date when he would have been entitled to it had he been examined and found qualified at the time so required by law or regulation."

> sixteenth section of the act of July 16, 1862; but the evident and sole purpose of the law is to prevent an officer from being deprived, by absence on duty, of the increased pay which promotion would have given him.' In other words, the meaning of the law is that if an officer is delayed in his promotion because he has not been examined, and his examination has been delayed by his absence on duty, he shall, when promoted, have the increased pay of the new grade, to begin from the time when his examination should have taken place."

The doctrine of this case has been carried forward throughout later decisions construing subsequent acts of Congress on the same subject containing similar, though not identical, language.

The Act of March 4, 1913, 37 Stat. 892, 34 U.S.C.A. 870, which superseded the 1870 Act, still controls accrual of pay and allowances upon permanent promotion of officers of the regular Navy, and provides:

> "All officers of the Navy who, since the 3d day of March, 1899, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions."

The right of an officer, whose promotion was delayed by his absence on duty, to additional pay from the time he would have been promoted but for such absence is not stated in the Act. However, in judicial interpretation of

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the Act, that principle was found to be within its meaning.[2]

The Naval Reserve Act of 1938, Ch. 690, Sec. 312; 52 Stat. 1183; 34 U.S.C.A. 855k, as originally enacted, made the same provision as to reserve officers as did the Act of March 4, 1913, for regular officers.[3]

The Act of August 27, 1940, Ch. 694, Sec. 8c, 54 Stat. 865, clarified the language to read:

> "* * * hereafter all officers of the Naval Reserve and the Marine Corps Reserve who may be advanced to a higher grade or rank in time of peace or in time of war or national emergency under the provisions of the Naval Reserve Act of 1938, shall be allowed the pay and allowances of the higher grade or rank from the dates of rank as stated in their commissions, as distinguished from the dates of commission or dates of acceptance of commission and the dates of rank as stated in their commissions shall be conclusive for all purposes * * *."

This amendment was designed to put again in clear statutory language the principle that the date of rank (where

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[2] *Wadsworth* v. *U. S.*, 55 Ct. Cl. 383; *Downes* v. *U. S.*, 52 Ct. Cl. 237; *Smith* v. *U. S.*, 50 Ct. Cl. 244; *Crappo* v. *U. S.*, 50 Ct. Cl. 337; *Williams* v. *U. S.*, 37 Ct. Cl. 316. The procedure was then, as it is now, to set out as the "date of rank" the date upon which the promotion in ordinary course of events would have been made. Thus, there were two dates "stated in the commission"—the date of promotion and the earlier date of rank. The latter date established right to pay of the higher rank to which promoted. See also: *Smith* v. *U. S.*, 76 Ct. Cl. 520, so construing identical language in the Act of June 10, 1926, former 34 U.S.C.A. 348.

[3] "* * * provided further, that officers of the Naval Reserve and Marine Corps Reserve that may be advanced to a higher grade or rank under the provisions of this Title shall be allowed pay and allowances of the higher grade or rank from the date of rank stated in their commission."

different from the date of the promotion order) governs accrual of additional pay by reason of promotion.

This section controlled accrual of pay and allowances upon permanent promotion of Naval Reserve officers, until its repeal in 1952.[4]

In many cases, an officer was not physically qualified for promotion at the time he normally would have been promoted under existing law.[5] This failure of physical qualification arose in two ways: physical disability suffered in line of duty, later removed; and absence on duty or otherwise unavailable for physical examination.[6] In either case, adjustment for the delay in promotion from this cause was made by setting out in the promotion order as the "date of rank" or effective date of promotion the

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[4] Repealed by Act of July 9, 1952, Ch. 608, part VIII, Sec. 803; 66 Stat. 505. The permanent promotion of Naval Reserve officers is now governed by the Act of September 3, 1954, (Reserve Officer Personnel Act of 1954) 68 Stat. 1149, 50 U.S.C.A. App. Chap. 27. That law provides (Sec. 303, 68 Stat. 1154, 50 U.S.C.A. App. 1223b): "To carry out the provisions of this subchapter a promotion may be made effective before, on or after the date accomplished, and the officer shall be entitled to pay, allowances, and benefits authorized by law for the higher grade from such effective date." Subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject. *Great Northern Ry. Co.* v. *U. S.*, 315 U.S. 262, 62 Sup. Ct. 529, 86 L. Ed. 836; *Sarlls* v. *U. S.*, 152 U.S. 570, 14 Sup. Ct. 720, 38 L.Ed. 556.

[5] Physical qualification is required of regular officers: Act of April 21, 1864, 13 Stat. 53 as amended, R. S. 1493 *et seq.*, 34 U.S.C.A. 271 *et seq.;* for reserve officers: Act of June 25, 1938, 52 Stat. 1183, 34 U.S.C.A. 855k.

[6] Temporary physical disability: *Wadsworth* v. *U. S.*, 55 Ct. Cl. 383; *Downes* v. *U. S.*, 52 Ct. Cl. 237; Absence on duty: *Howell* v. *U. S.*, 25 Ct. Cl. 288, 17 Op. Atty. Gen. 329.

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date upon which promotion would have been made but for the delay beyond the officer's control.[7]

Such was the established legal doctrine governing the time the higher pay scale became effective as to permanent promotions both of regular Navy personnel and reservists. The enactment of each successive provision on the same subject in similar if not identical language carried forward the previously settled judicial construction.[8]

In 1941, a new scheme of temporary promotions was created to meet the need for higher ranking officers in a rapidly expanding wartime Navy. The Act of July 24, 1941, 55 Stat. 603, 34 U.S.C.A. 350, merely enabled the President to promote officers under existing law without limitation as to numbers in each grade, and without resort to the cumbersome formalities of selection and qualification theretofore existing. Since the 1941 law made no provision for time of accrual of higher pay and allowances upon temporary promotion, the previously existing laws applied. The Court of Claims so held (R. 26).

Upon the outbreak of full scale war, complications immediately arose in administration of pay and allowance accounts of armed forces personnel who were absent on

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[7] Of course, the "date of rank" cannot be a date earlier than the officer was eligible for promotion. *Hunt* v. *U. S., supra; Crapo* v. *U. S.*, 50 Ct. Cl. 337; *Toulon* v. *U. S.*, 51 Ct. Cl. 87; *Downes* v. *U. S.*, 52 Ct. Cl. 237; *Hooper* v. *U. S.*, 53 Ct. Cl. 90. Here, plaintiff was eligible for temporary promotion under the Act of July 24, 1941, 55 Stat. 603, 34 U.S.C.A. 350, on the respective effective dates of his promotions. The appointing power had authority to determine when he would have been promoted but for his status as a prisoner.

[8] *Hecht* v. *Malloy*, 265 U.S. 144, 44 Sup. Ct. 462, 68 L. Ed. 949; *Dismuke* v. *U. S.*, 297 U.S. 167, 56 Sup. Ct. 400, 80 L.Ed. 561.

duty, missing in action, captured or beleaguered by the enemy—problems that led to the Missing Persons Act of March 7, 1942, as amended, 56 Stat. 143, 58 Stat. 679, 680, 50 U.S.C.A. App. 1002, which provides:

> "Any person who is in active service and who is officially determined to be absent in a status of missing, missing in action, interned in a neutral country, captured by the enemy, beleaguered or beseiged shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same pay and allowances to which he was entitled at the beginning of such period of absence or may become entitled thereafter * * *."[9]

All other provisions of law relating to pay and allowances, insofar as the rights of prisoners of war thereunder are concerned, must be considered in light of this remedial legislation.

The Navy Department did not know if the men surrendered at Corregidor were alive or dead. Most of them were in fact dead. It would have been futile and highly irregular to issue orders in regular course promoting of-

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[9] Congress in enacting the Missing Persons Act anticipated that personnel, missing or prisoners of war, would receive promotions. Report 1674, June 17, 1944, quoted in *Dilks* v. *U. S.*, 118 Ct. Cl. 438, 94 F. Supp. 663, states the purpose of the Act: "(b) A person is entitled to receive or have credited to his account the pay and allowances he was entitled to receive in the beginning of such period of absence or which he may become entitled to thereafter. Initially and subsequently included are credits for foreign duty and sea pay, submarine, aviation and parachute pay, longevity, medal pay, uniform allowances, rental subsistence and quarters allowances, increases incident to promotion and longevity and other pay and allowances that may be authorized by law. Temporary or per diem allowances are not included."

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ficers whose very existence was in grave doubt, and whose physical qualifications were not known.

However, the Department could and did adjust inequities in promotion and seniority as to those officers who survived, upon their eventual liberation in 1945. Following the time-honored custom, the liberated officers (including plaintiff) received the promotions which they would normally have received had they not been absent as prisoners of war. This was accomplished by back-dating each such promotion to the effective date it normally would have been made (R. 29).

The appointing authority clearly had the right to determine the date upon which plaintiff would have been promoted but for the exigencies of the service and the fortunes of war, and set the effective date accordingly;[10] and under the law as it had existed for over a hundred years, pay and allowances of the higher rank would start on that effective date, or "date of rank."

The Court of Claims, however, held directly to the contrary (R. 26-28, incl.) solely because of certain language in the Act of June 30, 1942, 56 Stat. 463, 50 U.S.C.A. App. 810 (now 34 U.S.C.A. 350k). That Act, after suspending permanent promotions as a wartime measure, provided further:

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[10] See *Smith* v. *U. S.*, 50 Ct. Cl. 244, where the Court said with respect to 34 U.S.C.A. 870: "If the latter Act means anything, it was intended by Congress thereto to confer upon the appointing power the right to name the date from which an officer advanced in grade or rank should take such grade or rank and to receive pay and allowances accordingly. This is the plain language of the law and we see no reason for going afield to give it any strained construction even if we were allowed that privilege."

> "Sec. 5. Personnel, heretofore and hereafter temporarily appointed pursuant to and as defined in the Act of July 24, 1941 (Public Law 188, Seventy-seventh Congress), shall be entitled to the pay and allowances of the grade or rank to which so appointed from the dates on which such appointments are made by the President, and their appointments, unless expressly declined, shall be regarded for all purposes as having been accepted on the date made, without formal acceptance or oath of office."[11]

The purpose of this Act was the exact opposite of the construction placed upon it by the Court of Claims (R. 27-28). It was intended to correct certain inequities arising under wartime conditions, not to create worse inequities of its own. Previously, a formal written oath of office was required of each promoted officer before he could receive pay of the higher grade. In wartime, certain ships went down, carrying these signed forms with them among their records. In calculating pay, gratuities and death benefits, proof was lacking that previously promoted officers were properly serving in the higher grade. The purpose of the Act of June 30, 1942, was to prevent discrimination against combat casualties from loss of these records. In that effort, the Act was fully consistent with the policy of the Missing Persons Act of a few months before, and with all similar wartime legislation.

The Act of June 30, 1942, sought to effectuate its purpose by abolishing the requirement of formal written acceptance of promotion and oath of office. Hence the lan-

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[11] Plaintiff's temporary promotions in issue here were pursuant to the Act of July 24, 1941 (R. 29).

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guage that pay accrues from the "date made" without formal acceptance or oath of office.

It is apparent from the language of the Act and from its legislative history, that Section 5 was concerned only with the oath of office.[12] There was no intent to change the time honored policy of adjusting inequities from absence in combat by adjustment of date of rank when promotion later became possible.[13] Yet the effect of the Court of Claims' decision is to deny the President as appointing authority the power so to adjust inequities in rank and pay arising out of the exigencies of war. The policy of setting the effective date of a delayed promotion has long been recognized by the courts—and recognized as within the authority of the appointing power. *Smith* v. *U. S.*, 50 Ct. Cl. 244.

That policy still holds as to peacetime promotions. The Court of Claims has reached the anomalous result of denying that power to the President as to wartime promo-

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[12] House Report 2238, Committee on Naval Affairs, June 15, 1942, reads in part: "Under existing law, personnel temporarily appointed or promoted in grade are not entitled to the pay of the grade to which appointed or promoted prior to the date of execution of an oath of office. In many instances, officers so appointed or promoted have been lost in action, presumably after having executed the oath of office, and the form has been lost with the ship. Thus, the Navy Department is without positive knowledge that these officers were, in fact, serving in the higher grade when lost in action. Therefore, their dependents are denied the death benefits which would be based on the higher grade. This section will correct this situation and at the same time remove the necessity for useless paper work and much correspondence."

[13] Legislative intent is divined from an act's legislative history, and the direction and scheme legislation generally on the subject. *U. S.* v. *Katz*, 271 U.S. 354, 46 Sup. Ct. 513, 70 L. Ed. 986 and cases cited. Cf. *Singer* v. *U. S.*, 323 U.S. 338, 65 Sup. Ct. 282, 89 L. Ed. 285.

tions only. Thus, in time of war or national emergency, when inequities of this sort demanding adjustment arise most frequently, the power to correct those inequities or discriminations is denied. Such a rule would be manifestly unjust in its operation, resulting in discriminating against victims of combat in favor of officers not engaged in a shooting war. Congressional intent to produce such absurd consequences or such flagrant injustice will not lightly be inferred.[14]

This harsh and unreasonable interpretation comes from an over-technical or too-literal interpretation of the words of the Act. It is a result never intended or anticipated by Congress in enacting the legislation. Such a narrow interpretation of the language used (especially since in conflict with the underlying policy of all wartime remedial legislation) will not be followed if a more liberal and sensible interpretation can be found in the language of the Act.

The language "the date on which such appointments are made by the President" in the 1942 Act contains an ambiguity similar to the language "the dates stated in their commissions" in earlier laws. In each case the promotion order contains two dates—the date of its actual issue, and the earlier "date of rank" or effective date. The appointing authority has the power to fix the effective date of any promotion order on a date prior to its actual issue. If the promotion is intended to be effective on the date of

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[14] *Sorrells* v. *U. S.*, 287 U.S. 435, 53 Sup. Ct. 210, 77 L. Ed. 413; *U. S.* v. *Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Markham* v. *Cabell*, 326 U.S. 404, 66 Sup. Ct. 193, 90 L. Ed. 165; *U. S.* v. *American Trucking Ass'n*: 310 U.S. 534, 60 Sup. Ct. 1059, 84 L. Ed 1345.

"date of issue"
its issue, then the "date of rank" and the "d date (as de-
would coincide. If, however, the effective lier date when
termined by the President) is to be an earlie for his absence
the officer would have been promoted but fo ate is the "date
as a prisoner of war, the earlier effective dat ly construction
made by the President." Such is the only Act of June 30,
fully consistent with the language of the Ac omotion policy,
1942; and also consistent with established pro vell established
with fairness and justice.[15] A policy so we ess and equality
in practice and so firmly grounded in fairness nel will not be
of treatment among armed forces personne Congress to do
overturned lightly, or unless the intent of C t apparent here.
so is clearly apparent.[16] Such intent is not a

CONCLUSION

s case calls for
It is respectfully submitted that this Court and that
the exercise of supervisory powers by this C rule of law an-
the writ sought should be allowed. The ru ninates unfairly
nounced by the Court of Claims discrimin prisoner of war.
against plaintiff because of his absence as a pr rgency, the rule
In any future time of war or national emerg rsonnel who are
will discriminate against armed forces perso captured or be-
missing in action, absent on a mission, ca by would other-
leaguered by the enemy at the time they

53, 58 Sup. Ct. 167,
[15] *People of Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 35 U.S. 377, 69 Sup.
82 L. Ed. 235; *Vermilya-Brown Co.* v. *Connell*, 335 1, 68 Sup. Ct. 1375,
Ct. 140, 93 L. Ed. 76; *Shapiro* v. *U. S.*, 335 U.S. 1, *Products*, 322 U.S.
92 L. Ed. 287; Cf. *Addison* v. *Holly Hill Fruit Pr* v. *Cabell*, *supra*.
607, 64 Sup. Ct. 1215, 88 L. Ed. 1488; *Markham* v. 2 L. Ed. 473; *C. I. R.*

[16] *U. S.* v. *Sweet*, 245 U.S. 563, 38 Sup. Ct. 193, 62 L.
v *Rivera's Estate*, 2 Cir., 214 F.2d 60

wise be promoted. It denies the appointing authority the power to correct inequities so arising (but denies it only in wartime). The result is unjust and absurd. It is required neither by the language of the act nor by the principles of justice. The judgment of the Court of Claims should be reversed.

Respectfully submitted,

RUSSELL V. JOHNSON,

Attorney for Petitioner.

Of Counsel:

CHARLES R. NESBITT,
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EVERETT E. COTTER,
Oklahoma City, Oklahoma.

April, 1955.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 50-52

(Decided November 30, 1954)

WILLIAM A. BERRY v. THE UNITED STATES

Mr. Charles R. Nesbitt for the plaintiff. *Mr. Everett E. Cotter* was on the brief.

Miss Frances L. Nunn, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Ernest C. Baynard* was on the brief.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

This is a claim by an officer of the U. S. Naval Reserve, promoted following his release from a Japanese prisoner-of-war camp, for active duty pay and allowances in the grades to which he was promoted from the dates of rank stated in his commission rather than from the dates on which his appointments were made by the President.

Plaintiff was commissioned an Ensign in the U. S. Naval Reserve on September 2, 1941, and was immediately called to active duty. Thereafter, he was captured by the Japanese upon the surrender of Corregidor on May 6, 1942, and was liberated by American forces at Manila on February 4, 1945.

Pursuant to the provisions of the Act of July 24, 1941, 55 Stat. 603, plaintiff, on February 15, 1945, was promoted to the temporary grade of Lieutenant, Junior Grade, to rank from October 1, 1942, and on October 5, 1945, was promoted to the temporary grade of Lieutenant, to rank

from November 1, 1943, and on the same date, to the temporary grade of Lieutenant Commander to rank from October 3, 1945.

By orders dated November 9, 1945, plaintiff was discharged from active service, effective at the end of his terminal leave on December 16, 1945.

Plaintiff was paid as an Ensign at $150 per month for the period October 1, 1942, through September 1, 1944; as an Ensign with over three years of service at $157.50 per month for the period September 2, 1944, through February 14, 1945. Plaintiff was paid as a Lieutenant, Junior Grade, with over three years of service at $175 per month for the period February 15, 1945, through October 2, 1945, and as a Lieutenant Commander with over three years of service at $262.50 per month for the period October 3, 1945, to December 16, 1945.

During the period from May 11, 1942, to October 9, 1945, plaintiff, as a single officer with no dependents, was credited with a subsistence allowance at the rate of $0.70 per day as authorized for single officers. During the aforesaid period plaintiff received no quarters allowance except for the period April 12 to 13, 1945, during which time he was required to procure quarters at his own expense and he was credited the rental allowance applicable to a single officer of his rank for these two days.

On February 28, 1948, by action of the Board for Correction of Naval Records, plaintiff's records were corrected to show that he was released from active duty on March 16, 1946, instead of December 16, 1945, as stated in his inactive duty orders of November 9, 1945. Subsequently, on March 14, 1951, by petition No. 50069, filed with this court, plaintiff sought recovery of $879, this amount representing 90-day terminal leave pay, and on November 6, 1951, this court entered judgment in favor of plaintiff for said amount.

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Defendant, in its argument before the court for the first time, urges that plaintiff's claim is barred by the statute of limitations.[1]

The plaintiff, in oral argument, contends that the statute of limitations was not pleaded and therefore was not timely raised by the defendant. The cases uniformly hold that the defense of the statute of limitations is jurisdictional and ever present in actions against the United States whether pleaded or not. *Siskind* v. *United States,* 116 C. Cls. 809; *Peysert* v. *United States,* 41 C. Cls. 311; *Myers, Administrator* v. *United States,* 22 C. Cls. 80. Thus, defendant is not precluded from raising the issue at this time.

Defendant says plaintiff's right, if any, to receive compensation he claims, is barred by the statute of limitations. That the statute was tolled by the Soldiers' and Sailors' Civil Relief Act of 1940[2] until plaintiff left military service. That when plaintiff went on terminal leave he was no longer on military service, the statute of limitations began to run from November 9, 1945, and suit was not filed until February 4, 1952, more than six years later.

If, as defendant contends, plaintiff remained in the military service only until November 9, 1945, the Soldiers' and Sailors' Civil Relief Act of 1940, *supra,* would toll the statute to that date. It would then follow that since his suit was not filed until February 4, 1952, his claim would be barred by the 6-year statute of limitations.

However, "by order dated November 9, 1945, plaintiff was discharged from active service, effective at the end of his terminal leave, December 16, 1945. On February 12, 1948, by action of the Board for Correction of Naval Records, plaintiff's records were corrected to show that he was released from active duty on March 16, 1946, instead of

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[1] Act of June 25, 1948, 62 Stat. 976, 28 U.S.C., § 2501 (1952).

[2] 54 Stat. 1181, as amended 56 Stat. 770, 50 U.S.C. App., § 525 (1952).

December 16, 1945, as stated in his inactive duty orders of November 9, 1945."

The Court of Appeals in the case of *Hironimus* v. *Durant*, 168 F.2d 288, held that an officer remains on active service until the conclusion of terminal leave. This was a *habeas corpus* action to test the legality of her conviction of larceny by a general court-martial. Plaintiff, a WAC captain, claimed that her active service terminated at the commencement of her terminal leave, and that thereafter (while on terminal leave) she was beyond military jurisdiction. The legality of her conviction depended on whether terminal leave constituted active service. Judge Soper in his opinion said at pages 289-290:

> The Judge Advocate General of the Army has consistently held, as the orders given the petitioner on March 9 themselves indicated, that an officer, while on terminal leave, remains on active duty. SPJGA 1945/13,372, 14 December 1945. Such an officer is held subject to all the provisions of the Army regulations in respect to discipline; and accordingly, although such an officer who is not a member of the regular army may become a candidate for public office, nevertheless since he is on active duty it is held that he remains subject in the conduct of his campaign to laws and regulations applicable to officers on active duty. SPJGA 1946/2188, 1 March 1946. In his opinion in this case the Judge Advocate General said: "Prior to the expiration of his terminal leave, an Army officer remains an officer on active duty. Consequently, during such leave he remains subject to the laws and regulations governing political activity by officers on active duty."
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> So also SPJGA 1945/10842, 10 October 1945, where the Judge Advocate General said that "Although an officer of the Army on terminal leave is normally not

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called upon to perform duty, he is nevertheless in an active duty status and is not, technically speaking, separated from the service or relieved from active duty, as the case may be, until the expiration of his terminal leave."

The *Hironimus* case, *supra,* was cited as authority and the rule followed in an opinion by Judge Whitaker in the case of *Curzon* v. *United States,* 128 C. Cls. 5, wherein it was held that similar leave of a government employee accrued pursuant to the Act of August 1, 1941, 55 Stat. 616, constituted active service in determining the length of service under the Civil Service Retirement Act.[3]

Thus, it is apparent that the 6-year statute of limitation period on plaintiff's claim did not commence until the conclusion of his active service, March 16, 1946. This action, having been filed on February 4, 1952, was less than six years from that date.

The question then presented is whether plaintiff is entitled to the additional pay of the higher ranks from the respective dates of the promotions or from the earlier "dates of rank" stated in these promotion orders.

Plaintiff was promoted pursuant to the provisions of the Act of July 24, 1941, 55 Stat. 603. Sections 1, 3, 5, and 11(a) of the act provide in pertinent part as follows:

> * * * That except as otherwise specified herein the authority granted by this Act shall be exercised only in time of war or national emergency determined by the President.
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> * * * * * * * * *
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> SEC. 3. Officers on the active list of the Regular Navy or Marine Corps in commissioned ranks, including those appointed under the authority of section 2 of this Act, may be temporarily appointed to higher ranks or

[3] 46 Stat. 468, as amended.

grades in the Regular Navy or Marine Corps, and the provisions of paragraphs 9 of section 1 of the Act approved June 10, 1922 (42 Stat. 626; 37 U.S.C. § 2), shall be applicable to all officers eligible for consideration for appointment or advancement pursuant to the provisions of this Act, not only during the existence of a state of war formally recognized by Congress, but also during a national emergency determined by the President.

* * * * * * * *

SEC. 5. The temporary appointments under the authority of the Act shall be in such numbers as the President may determine that the needs of the service require and in such manner and under such regulations as he may prescribe.

* * * * * * * *

SEC. 11. The provisions of this Act, except as may be necessary to adapt the same thereto shall apply to—

(a) Personnel of the Naval Reserve (except the Fleet Reserve) and the Marine Corps Reserve (except the Fleet Marine Corps Reserve) in like manner and to the same extent and with the same relative conditions in all respects as are provided for personnel of the Regular Navy and Marine Corps, but this shall not be construed to authorize the temporary appointment of the personnel thereof to ranks or grades in the Regular Navy or Marine Corps.

The Act of July 24, 1941, *supra,* was designated to provide a simple method of making temporary appointments in times of emergency and to replace the more cumbersome peacetime method of accomplishing the permanent promotion of officers by the selective process.

The statutes which prescribe the peacetime method for making permanent promotions for officers prior to World War II were the Act of June 23, 1938, 52 Stat. 954, for officers of the regular Navy and Marine Corps, and the

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Naval Reserve Act of 1938, approved June 25, 1938, 52 Stat. 1175, for officers of the Naval and Marine Corps Reserve. The Act of June 25, 1938, upon which plaintiff relies to support his claim, reads as follows:

> In time of war or national emergency, officers of the active list of the Naval Reserve or the Marine Corps Reserve employed on active duty shall be advanced in their respective corps in grade and rank in the same manner as is or may be prescribed for officers of the regular Navy or the Marine Corps, respectively, in such numbers for each grade or rank, as may be prescribed from time to time by the Secretary of the Navy, and when so advanced, they shall take precedence among themselves and other officers of the Navy and Marine Corps, in accordance with date of such advancement or promotion: *Provided* that no officer of the Naval Reserve or Marine Corps Reserve shall be advanced to a higher rank until he has qualified therefor by such mental, moral, professional and physical examinations as the Secretary of the Navy shall prescribe: *Provided further* that hereafter all officers of the Naval Reserve and the Marine Corps Reserve who may be advanced to a higher grade or rank in time of peace or in time of war or national emergency under the provisions of the Naval Reserve Act of 1938, *shall be allowed the pay and allowances of the higher grade or rank from the dates of rank as stated in their commissions, as distinguished from the dates of commission or dates of acceptance of commission and the dates of rank as stated in their commissions shall be conclusive for all purposes.* * * *.

There can be no doubt from the reading of the above act that officers promoted under the Naval Reserve Act of 1938, *supra*, were entitled to pay and allowances from their dates of rank. *Smith* v. *United States*, 76 C. Cls. 520; *Couvrette* v. *United States*, 76 C. Cls. 746; *Hargrove* v.

United States, 80 C. Cls. 642. In this case, however, plaintiff and defendant have stipulated that the promotions were had under the Act of July 24, 1941, *supra.* The Act of July 24, 1941, insofar as it relates to pay and allowances, is silent as to the dates of rank as provided for in the Act of June 25, 1938, *supra,* and it is reasonable to assume that under those circumstances plaintiff would be entitled to "pay and allowances of the higher grade or rank from the dates of rank as stated in their commission." However, on June 30, 1942, Public Law 639, 77th Congress, 56 Stat. 463, became law. The act was entitled "An Act to provide for the better administration of officer personnel of the Navy and Marine Corps during the existing war, and for other purposes." Section 1 of this act suspended the provisions of existing law insofar as those provisions related to the permanent promotion or advancement of all officers of the Navy and Marine Corps. Thus, the provisions of the Act of June 25, 1938, *supra,* became inoperative, and plaintiff's promotions could only have been pursuant to the Act of July 24, 1941, *supra.*

Section 1 referred to above reads in pertinent part as follows:

> * * * the provisions of existing law insofar as they relate to the permanent promotion or advancement of all officers of the Navy and Marine Corps * * * are hereby suspended * * *.

Section 5 of the Act of June 30, 1942, *supra,* provides that the dates on which personnel *appointed pursuant to the Act of July 24, 1941, supra,* become entitled to the pay and allowances of the grades or ranks to which appointed shall be on the dates *on which such appointments were made by the President.* Section 5 reads as follows:

> Personnel heretofore and hereafter temporarily appointed pursuant to and as defined in the Act of July 24, 1941 (Public Law 188, seventy-seventh Congress),

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shall be entitled to the pay and allowances of the grade or rank to which so appointed from the dates on which such appointments are made by the President, and their appointments, unless expressly declined shall be regarded for all purposes as having been accepted on the date made, without formal acceptance or oath of office [Italics supplied.]

The legislative history of the Act of June 30, 1942, *supra,* does not disclose the reasons for not carrying into effect the provisions of the Naval Reserve Act of June 25, 1938, *supra,* as to "dates of rank." The purpose of section 5 of the act was explained in the report of the House Committee on Naval Affairs, House Report 2238 on H. R. 7160, June 15, 1942, as follows:

> Under existing law, personnel temporarily appointed or promoted in grade are not entitled to the pay of the grade to which appointed or promoted prior to the date of execution of an oath of office. In many instances, officers so appointed or promoted have been lost in action, presumably after having executed the oath of office form, and the form has been lost with the ship. Thus the Navy Department is without positive knowledge that these officers were, in fact, serving in the higher grade when lost in action. Therefore their dependents are denied the death benefits which would be based on the higher grade. This section will correct this situation and at the same time remove the necessity for useless paper work and much correspondence.
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> * * * * * * * *
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> The purpose of this bill is to suspend existing provisions of law relating to the permanent promotion of all officers of the Navy and Marine Corps. * * * In addition the bill amends other features of present laws in order that they may be better and more efficiently administered.

[APPENDIX]

* * * * * * * *

In certain cases, where necessary, the precedence of officers under the temporary selection procedure is provided for and clarified. There is a special provision preserving promotion rights where under war conditions the loss or records and unavailibilty of officers to execute formal papers is probable.

This court has consistently given effect to the plain language of similar provisions of other statutes. Thus plaintiffs were allowed pay and allowances from "the date of rank stated in their commissions" by this court in construing the plain language of the Act of June 10, 1926, 37 Stat. 892. *Smith* v. *United States, supra; Couvrette* v. *United States, supra.*

The fact that we have great sympathy for plaintiff because he languished in a Japanese prison camp, suffered the privations of a prisoner of war and was not given the same privileges as his fellow officers with regard to promotion and pay and allowances, does not give us the right to speculate as to the intent of Congress when the language of the act is clear. *Prindle* v. *United States,* 41 C. Cls. 8.

Plaintiff was promoted pursuant to the Act of July 24, 1941, *supra.* Persons promoted pursuant to said act are entitled to pay and allowances of the higher rank from the date on which the appointments were made by the President. The appointments plaintiff received were made by the President on February 15, 1945, and October 5, 1945. Plaintiff has received the pay and allowances of the respective grades to which he was promoted from the dates the appointments were made by the President. He is not entitled to more, and the petition is accordingly dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

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